

PUBLIC UTILITIES COMMISSION505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

September 12, 2003

Alternate to Agenda ID#2180
Adjudicatory

TO: PARTIES OF RECORD IN CASE 99-01-039

Enclosed is an Alternate Draft Decision of Commissioners Peevey and Kennedy to the draft decision of Administrative Law Judge (ALJ) Vieth previously mailed to you. When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

As set forth in Rule 77.6, parties to the proceeding may file comments on the enclosed alternate no later than 5pm on September 19, 2003. Reply comments may be filed no later than 5pm on September 25, 2003. An original and four copies of the comments with a certificate of service shall be filed with the Commission's Docket Office and copies shall be served on all parties on the same day of filing. Anyone filing comments shall electronically serve those on the service list who have provided electronic addresses. Parties shall also ensure that they electronically serve their comments to Commissioner Peevey's Chief of Staff, Peter Arth, Jr., at paj@cpuc.ca.gov and the assigned ALJ Vieth, at xjv@cpuc.ca.gov. For those who have not provided electronic addresses, printed copies of the comments shall be served by first class mail or other expeditious mode of delivery.

/s/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

ANG:acb

Enclosures

**Decision ALTERNATE DRAFT DECISION OF COMMISSIONERS PEEVEY
AND KENNEDY**

(Mailed 9/12/03)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The Greenlining Institute, Latino Issues Forum,

Complainants,

vs.

Pacific Bell, Pacific Bell Information Services,

Defendants.

Case 99-01-039
(Filed January 27, 1999)

OPINION GRANTING PETITION TO MODIFY DECISION 03-03-022

SUMMARY

Decision (D.) 03-03-022 awarded the Greenlining Institute and Latino Issues Forum (G/LIF) \$229,785.34 in compensation for substantial contributions to D.01-04-037. On April 8, 2003, the Greenlining Institute (Greenlining) filed a petition for modification of D.03-03-022 granting G/LIF intervenor compensation for their substantial contribution to D.01-04-037. Greenlining believes that its attorney and expert rates should be reconsidered and increased in light of the rates awarded to attorneys for Disability Rights Advocates in D.03-01-075. This decision grants the petition, and increases our prior award to G/LIF by \$53, 796 based on comparable training and experience for the attorneys and experts involved in these two different matters.

In addition, we direct the Administrative Law Judge Division to develop an annual proceeding to set intervenor fees on a prospective basis for attorneys and experts on a peer basis in order to avoid the type of inequitable fee award outcomes that we address in this order, and to propose a fair and feasible approach for handling similar pending requests from Greenlining for adjustment of prior awards to conform to this decision.

BACKGROUND

D.03-01-075 (DRA decision) awarded rates for 2001 and 2002 for the following attorneys for Disability Rights Advocates:¹

<u>Attorneys</u>	<u>Requested</u>	<u>Adopted</u>
Sid Wolinsky	\$535	\$435 ²
Lawrence Paradis	\$405	\$310 ³

D.03-03-022 awarded rates for 1999 for the following attorneys and experts for Greenlining:

<u>Attorneys</u>	<u>Requested</u>	<u>Adopted</u>
Robert Gnaizda	\$300	\$300
Susan Brown	\$260	\$275
Christopher Witteman	\$250	\$245

<u>Experts</u>	<u>Requested</u>	<u>Adopted</u>
John Gamboa	\$250	\$150

¹ This list includes only those advocates for Disability Rights Advocates cited by Greenlining in its petition.

² Rate adopted for 2001 and 2002.

³ Rate adopted for 2001.

Thomas Hargadon	\$250	\$250
Michael Phillips	\$250	\$250

In its petition, Greenlining argues that its attorneys and experts have comparable training and experience to Sid Wolinsky and Larry Paradis, and should receive close to the same rates for their work in 1999 as the rates adopted for Sid Wolinsky and Larry Paradis for their work in 2001 and 2002. Greenlining acknowledges that the 1999 rates it now seeks for its attorneys and experts are based on rates awarded for work in 2001 and 2002, so Greenlining adjusts the rates downward by 5% to account for the different years.

Section 1804 (e) of the Public Utilities Code⁴ requires the Commission to issue a decision that determines whether the customer has made a substantial contribution and what amount of compensation to award. Section 1806 provides that the level of compensation must take into consideration the market rates paid to persons of comparable training and experience who offer similar services.

Greenlining supports its petition for modification with the following information: Robert Gnaizda of the Greenlining Institute graduated from Yale Law School one year prior to Sid Wolinsky, who also graduated from Yale Law School, has one more year of litigation experience than Sid Wolinsky, and 30 more years practicing before the Commission than Sid Wolinsky. In fact, Robert Gnaizda and Sid Wolinsky, along with Justice Anthony Kline, founded the Public Advocates in 1971. Robert Gnaizda's first case before the Commission was in 1970, and, in 1987, he was selected as the leading public interest attorney in the Bay Area. Yet, Sid Wolinsky was awarded \$435 per hour in the DRA decision, while Robert Gnaizda was awarded \$300 per hour in D.03-03-022.

⁴ All section references are to the Public Utilities Code, unless otherwise indicated.

According to Greenlining, the Commission has awarded Robert Gnaizda between \$270 and \$310 per hour maximum for 14 cases decided in 2002 by the Commission, which amounts to a disparity of \$125 to \$165 per hour when compared to the \$435 per hour award to Sid Wolinsky in the DRA case.⁵ Thus, Greenlining argues that Robert Gnaizda should be awarded the same hourly rate as Sid Wolinsky, adjusted downward by 5% because the work was done in 1999, amounting to \$413 per hour.

Susan Brown is the Director of the Latino Issues Forum's legal department, and the former director of the Mexican American Legal Defense and Education Fund (MALDEF). She graduated from law school in 1978, seven years before Larry Paradis, and has approximately seven more years of litigation experience. Yet, Larry Paradis was awarded \$310 per hour, while Susan Brown was awarded \$275 per hour. Thus, Greenlining argues that Susan Brown should be awarded

⁵ See Exh. A, a letter from G/LIF to all Commissioners dated February 25, 2003, which is attached to the Comments filed by G/LIF to the Draft Decision of ALJ Jean Vieth dated May 6, 2003. We acknowledge that Commission Rule of Practice and Procedure 77.3 prohibits new factual information, untested by cross examination, from being included in Comments or from being relied upon in post publication comments. However, Commission Rule of Practice and Procedure 87 provides for exceptions to these rules stating that the rules shall be construed liberally, and, in special cases, for good cause shown, the Commission may permit deviations from the rules. In this case, we rely on the assertion made by G/LIF in its February 25, 2003 letter to the Commissioners solely for the purpose of showing that G/LIF brought the issue of the discrepancy between the rates DRA was paid and the rates G/LIF was paid for intervenor compensation to the attention of the Commission shortly after the DRA decision was issued (January 30, 2003). We do not use the letter for the purpose of adding new factual information to the record. Therefore, we are of the opinion that this reference does not violate Rule 77.3 and falls easily under the exception created by Rule 87.

\$361 per hour, a rate that is half way between Larry Paradis's rate of \$310 per hour and Sid Wolinsky's rate of \$435 per hour.⁶

Similarly, Chris Witteman, formerly of the Greenlining Institute and now senior counsel with the Commission, has the same amount of legal experience as Larry Paradis, and appears to have substantially more litigation experience, yet Larry Paradis was awarded \$310 per hour, while Chris Witteman was awarded \$245 per hour.⁷ Thus, Greenlining argues that Chris Witteman should be awarded a rate of \$294 per hour.

Greenlining asserts that in the DRA decision, Larry Paradis, who is not only an attorney, but the Executive Director of DRA, was awarded an hourly rate of \$310 per hour for his participation as an expert. Greenlining argues that each of its experts has significantly more experience than Mr. Paradis.

Greenlining's Executive Director John Gamboa is a graduate of the University of California at Berkeley, a former Pacific Bell Manager of Latino and Asian American markets, and has 32 years of experience in this field. Mr. Gamboa, in his capacity as an expert, was awarded \$150 per hour. According to G/LIF, the California Department of Insurance recently awarded Mr. Gamboa an effective rate of \$290.50 per hour when it awarded G/LIF 83% of its requested compensation.⁸ Thus, Greenlining argues that Mr. Gamboa should be awarded a rate of \$332 per hour.

⁶ Note that Susan Brown has 10 more years of experience than TURN's Robert Finkelstein, who was awarded an hourly rate of \$310 for work performed in 2001 (D.02-03-033). (See Petition of the Greenlining Institute for Modification of D.03-03-022, p. 3.)

⁷ (See Petition of the Greenlining Institute for Modification of D.03-03-022, p.3.).

⁸ See D.03-03-022, pp. 13-14, fn. 10, citing Decision Awarding Compensation, File No. 1C02019862.

Greenlining's expert Michael Phillips was awarded an hourly rate of \$250 per hour. Mr. Phillips's experience includes testifying as an expert before this Commission, expertise in SBC Pacific Bell's marketing practices, and a background in business. Thus, Greenlining argues that Mr. Phillips should be awarded a rate of \$332 per hour.

Similarly, Greenlining's expert Thomas Hargadon was awarded an hourly rate of \$250 per hour. Mr. Hargadon's experience includes testifying before this Commission, as well as employment in telecommunications and media work. Thus, Greenlining argues that Mr. Hargadon should be awarded a rate of \$332 per hour.

DISCUSSION

Greenlining argues that despite the fact that it requested certain rates when it filed its request for compensation, the Commission should adjust the rates for 1999 now. We agree. Many parties eligible for intervenor compensation appear before the Commission. Each intervenor requests hourly rates for its advocates based on many factors, resulting in a range of rates awarded to advocates with similar training and experience. Each intervenor must make a showing regarding the hourly rates requested to justify an award and must do so on a timely basis. Although it is not our responsibility to award rates higher than requested simply because another intervenor may have been awarded a higher rate, we believe it appropriate to look to other rates adopted as a check that the rates requested are in the range of those adopted for other advocates with similar training and experience.

In this case, the DRA Decision was issued on January 30, 2003, almost two months before the Commission issued D.03-03-022. Greenlining wrote the Commission on three occasions prior to the issuance of D.03-03-022 regarding the

discrepancy between the market rates awarded to DRA in the DRA Decision and what it believes were below market rates awarded to G/LIF in the past.⁹ It appears that we did not look to the DRA decision when deciding upon the hourly rates to be awarded in D.03-03-022.

We should strive to ensure that there are not major discrepancies in awards to attorneys and experts with substantially similar backgrounds and experience. In this case, both Greenlining and LIF's attorneys and experts have substantially similar experience to the attorneys and experts in the DRA decision. Moreover, SBC California has no objection to the increase in the hourly fees requested for Greenlining and LIF's attorneys, with whom SBC California is familiar, stating that these attorneys "certainly have comparable skills and experience to the Disability Rights Advocates." SBC California has no comment regarding Greenlining's request for an increase in its experts' fees. (Response of SBC California to the Petition of the Greenlining Institute for Modification of D.03-03-022, p. 2.)

The ALJ's Proposed Decision denies relief to Greenlining on the basis of a general observation that "(i)t is up to each intervenor to justify their request for hourly rates, not the Commission's responsibility to award rates higher than requested simply because another intervenor may have been awarded a higher rate." While we generally agree with this position, the denial of relief in the instant case elevates form over substance. G/LIF learned of the intervenor award (including the relatively high attorney rates and expert fees awarded to DRA in January of this year, and subsequently received its own award in March.

⁹ See Exh's. A, B, and C, attached to the Comments filed by G/LIF to the Draft Decision of ALJ Jean Vieth dated May 6, 2003, comprised of letters from G/LIF to all Commissioners, to President Peevey, and from President Peevey to G/LIF, dated between February 25, 2003, and April 2, 2003. Also, see footnote 5.

On April 8, the instant Petition was filed, seeking an equitable adjustment to align their award with the rates and fees authorized to DRA. The ALJ has cited to no statutory bar or rule of procedure which would preclude us from granting the requested relief. G/LIF acted promptly to inform us of an apparent inequity in hourly rates and fees, and provided ample justification for increasing their awards for intervention in earlier cases. To leave the disparity in awards as between DRA and G/LIF unaddressed is unfair, and does not comport with the maxim of jurisprudence that "...for every wrong there is a remedy". (Ca. Civil Code Sec. 3523) In light of these facts and our desire to ensure equitable treatment of substantially similar intervenors, we agree with Greenlining and LIF's request that the hourly rates for attorneys and experts be modified as follows:

ATTORNEYS

Robert Gnaizda	\$413
Susan Brown	\$361
Chris Witteman	\$294

EXPERTS

John Gamboa	\$332
Thomas Hargadon	\$332
Michael Phillips	\$332

These rates are decreased by 5% from the rates awarded to DRA in D.03-01-075 since, in that decision, DRA was compensated for work done in 2001.

Therefore, we modify the award to G/LIF from the sum of \$229,785.34 to \$283,581.44, for substantial contributions to D.01-04-037.¹⁰

In granting increased attorney fee and expert rates in this matter, we are aware that Greenlining has filed similar petitions for modification to obtain upward adjustment of rates and fees awarded in other cases occurring in the same timeframe as Case 99-01-039. We note that the adjudication of these requests is somewhat unprecedented, and therefore follows no clear set of rules nor procedural path. The effort required to obtain a fair result has already served to impose a substantial administrative burden on both G/LIF and the Commission. We wish to avoid repetition or continuation of problem-solving arising from claims of inconsistent awards of hourly rates and fees as among intervenors, as well as to reduce the amount of time consumed in individual intervenor fee requests on the issues of appropriate rate and fee levels.

Therefore, we direct the Executive Director and Chief Administrative Law Judge to develop a process for the Commission to annually set rates for intervenor attorney, expert, and support staff fees. The fees could be set on a peer group basis, individual intervenor basis, or combination of the two approaches. We envision the proposed fees, upon adoption, to be applied in individual proceedings unless parties to the proceeding make a convincing case for doing otherwise based on unique circumstances. The twin goals of this exercise are (1) to promote fairness in awards, both in absolute and relative terms, and (2) to increase the administrative efficiency in making these awards, allowing intervenors to actually receive payment for their services to the Commission and utility consumers on a more expedited basis.

¹⁰ See Exh. C, attached to the Petition of the Greenlining Institute for Modification of D.03-03-022, for an hourly breakdown of the award.

Finally, we realize by providing equitable relief to Greenlining in this particular docket, we will establish a precedent for possibly affording similar rate and fee adjustments to this intervenor in prior proceedings where we have awarded intervenor compensation under similar circumstances to the instant proceeding. Indeed, several petitions from G/LIF are currently pending before us. We prefer to address the issue of where other equitable fee and rate increases may be warranted due to the DRA award in an integrated fashion. Thus, we will ask the ALJ Division to provide us with both procedural and substantive options for responding to similar requests from G/LIF, and defer any further consideration of these requests until we have reviewed the response from the ALJ Division.

We would like to receive this proposal for both prospective and retrospective establishment of rates and fees no later than December 30th, 2003 at which time we will consider the appropriate means for allowing comment on it.

Assignment of Proceeding

Carl W. Wood is the Assigned Commissioner¹¹ and Jean Vieth is the assigned ALJ in this proceeding.

Findings of Fact

1. Intervenor requests for hourly rates are based on many factors, resulting in a range of rates awarded to advocates with similar training and experience.
2. Each intervenor must justify its request for hourly rates in its request for compensation.
3. The hourly rates requested by Greenlining for work performed by attorneys and experts are consistent with the intent of Pub. Util. Code § 1806 that

¹¹ This proceeding formerly was assigned to Commissioner Neepser.

intervenor compensation awards shall take into consideration the market rates paid to persons of comparable training and experience who offer similar services.

4. Based upon their experience and qualifications, a \$413 per hour rate for Robert Gnaizda, \$361 per hour rate for Susan Brown, and \$294 per hour rate for Chris Witteman, for work in 1999, which led to substantial contributions to D.01-04-037, is reasonable. A rate of \$332 per hour is reasonable for work performed by experts John Gamboa, Thomas Hargadon, and Michael Phillips.

5. The relief requested by Greenlining is unopposed.

Conclusions of Law

1. The Commission should ensure that there are not major discrepancies in awards to attorneys and experts with substantially similar backgrounds and experience.

2. The changes to Greenlining's rates adopted herein are justified by a comparison to rates awarded to Greenlining's peers practicing before the Commission.

3. D.03-03-022 should be modified to increase the attorney and expert rates requested by Greenlining.

4. Greenlining should be awarded \$283,581.44 for its contribution to D.01-04-037.

O R D E R**IT IS ORDERED** that:

1. The petition to modify Decision 03-03-022 by Greenlining is granted.
2. G/LIF are awarded \$283,581.44 for its substantial contribution to

D.01-04-037.

3. The Executive Director and Chief Administrative Law Judge, in conjunction with the Administrative Law Judge Division, shall develop an annual proceeding to set intervenor fees for attorneys, experts, and support staff on a peer basis in order to avoid the type of inequitable fee award outcomes that we address in this order, and to consider whether additional rate and fee adjustments are appropriate on a retrospective basis. This proposal shall be prepared and submitted to the Commission no later than December 30, 2003, at which time the Commission shall consider the appropriate means for allowing comment on it.

4. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Alternate Draft Decision of Commissioners Peevey and Kennedy on all parties of record in this proceeding or their attorneys of record.

Dated September 12, 2003, at San Francisco, California.

/s/ Sally Cuaresma

Sally Cuaresma

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074,
TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.